Dharmaraja @ Abd Malik a/l Abd Wahab v Asian Ceramic Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1–25–12 OF 1998
KC VOHRAH J
16 NOVEMBER 1999

Labour Law *— Employment — Absenteeism — Whether employee absent from work for two consecutive working days — Whether absence of two consecutive days means that contract of employment is terminated — Whether circumstances surrounding absence must first be considered — Employment Act 1955 s 15(2)*

The claimant was an employee of the respondent. There was a meeting on 27 May 1994 between COW1 and the claimant with a few other kiln operators. The meeting resulted in the claimant leaving the factory premises. The claimant returned to work on 30 May 1994 at 3pm but was not allowed entry into the factory. By a letter dated 28 May 1994, the company stated that the claimant had by his conduct dismiss himself from the service with the company. The claimant claimed that his dismissal was without just cause or excuse. The Industrial Court found in favour of the company and hence the claimant applied for an order of certiorari to quash the decision of the Industrial Court.

Held, allowing the order of certiorari:

The chairman of the Industrial Court had misconstrued and in fact wrongly applied s 15(2) of the Employment Act 1955 in arriving at the decision that the claimant had breached his contract of employment with the company (see p 284D–E). In order for s 15(2) to apply, the employee must be absent from work for two continuous working days. The letter by which the claimant was deemed as having dismissed himself was dated 28 May 1994. At that date, two continuous days had not passed. In fact, the claimant had returned on the 30th but was refused entry into the factory and the chairman took into account the 29th and 30th as consecutive days. Furthermore, the chairman wrongly took into account the 29th as being a working day when the 29th was a Sunday. There was also failure to take into account that the claimant was contacted by the company's director, who directed the claimant to return to work on 30 May 1994 and that the claimant followed the instruction (see pp 286C–D, 288A–B).

Obiter:

An absence of two consecutive days does not mean that the contract of employment comes to an end automatically nor does it entitle the company to dismiss an employee as of right. The circumstances surrounding the absence must first be considered (see p 287F–G).

A [**Bahasa Malaysia summary**

Pihak yang menuntut merupakan seorang pekerja responden. Satu mesyuarat telah diadakan pada 27 Mei 1994 antara COW1 dan pihak yang menuntut dengn beberapa orang operator tanur. Mesyuarat tersebut mengakibatkan pihak yang menuntut meninggalkan premis B kilang tersebut. Pihak yang menuntut telah pulang untuk bekerja semula pada 30 Mei 1994 pada pukul 3pm tetapi tidak dibenarkan untuk memasuki kilang tersebut. Melalui sepucuk surat bertarikh 28 Mei 1994, syarikat tersebut telah mengatakan bahawa pihak yang menuntut telah melalui perbuatan beliau memberhentikan diri sendiri C daripada berkhidmat dengan syarikat tersebut. Pihak yang menuntut telah menuntut bahawa pemecatan beliau adalah tanpa sebab atau alasan yang adil. Mahkamah Perusahaan telah menyebelahi syarikat tersebut dan justeru itu pihak yang menuntut telah memohon untuk satu perintah certiorari untuk membatalkan keputusan Mahkamah Perusahaan tersebut.

D

Diputuskan, membenarkan perintah certiorari tersebut:

Pengerusi Mahkamah Perusahaan telah menyalahtafsirkan dan pada hakikatnya telah salah di dalam menggunakan s 15(2) Akta Pekerjaan 1955 di dalam mencapai keputusan tersebut bahawa pihak yang E menuntut telah melanggar kontrak pekerjaan beliau dengan syarikat tersebut (lihat ms 284D–E). Bagi tujuan s 15(2) terpakai, pekerja tersebut mestilah telah tidak hadir untuk bekerja selama dua hari berturut-turut. Surat di mana pihak yang menuntut telah dianggap sebagai telah memecatkan diri sendiri adalah bertarikh 28 Mei 1994. F Pada tarikh tersebut, dua hari berturut-turut belum berlalu lagi. Pada hakikatnya, pihak yang menuntut telah kembali bekerja pada 30 haribulan tetapi telah tidak dibenarkan masuk ke dalam kilang tersebut dan pengerusi tersebut telah mengambil kira 29 haribulan dan 30 haribulan sebagai hari yang berturut. Tambahan pula, pengerusi telah salah mengambil kira 29 haribulan sebagai hari G bekerja sedangkan 29 haribulan adalah hari Ahad. Terdapat juga kegagalan yang patut diambil kira bahawa pihak yang menuntut telah dihubungi oleh pengarah syarikat tersebut, yang telah mengarahkan pihak yang menuntut untuk kembali bekerja pada 30 Mei 1994 dan bahawa pihak yang menuntut mengikuti arahan tersebut (lihat H ms 286C–D, 288A–B).

Obiter:

Ketidakhadiran dua hari berturut tersebut tidak bermakna bahawa kontrak pekerjaan tersebut tamat secara automatik mahupun ia I memberikan hak kepada syarikat tersebut untuk memecat seorang pekerja. Keadaan sekitar ketidakhadiran tersebut juga mesti dipertimbangkan (liht ms 287F–G).]

Notes

For cases on absenteeism, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 656–659.

Cases referred to

Gim Aik Estate Sdn Bhd Malacca v National Union of Plantation Workers [Jan – June 1982] MLLR 117 (Award No 5582) (refd)

Legislation referred to

Employment Act 1955 s 15(2)

S Shanker (*P Kuppusamy & Co*) for the applicant.
Atma Singh Veriah (*Atma Singh Veriah & Co*) for the respondent.

Cur Adv Vult

KC Vohrah J: I am allowing the application for an order of certiorari to issue to quash Industrial Court Award No 604 of 1997 dated 24 December 1997. The matter is remitted to the Industrial Court to be heard by another chairman.

I rest my decision principally on the ground that the chairman of the Industrial Court had misconstrued and in fact wrongly applied s 15(2) of the Employment Act 1955 in arriving at the decision that the claimant had breached his contract of employment with the company, the respondent in this matter.

It is appropriate to set out the letter dated 28 May 1994 sent by the company to the claimant. What is to be noted is that there was a meeting held by COW1 with the claimant and a few other kiln operators. This was on 27 May 1994. The meeting resulted in the claimant leaving the meeting and then leaving the factory premises. The claimant returned to work on 30 May 1994 at 3pm but was not allowed entry into the factory.

I go back to the letter that was issued on 28 May 1995, just *one day* after the claimant left the premises which reads as follows:

Asian Ceramic Sdn Bhd
25, Jalan Perusahaan 2,
Kawasan Perusahaan Beranang
43700 Beranang, Selangor Darul Eshan, Malaysia

Tel: 03-8167615, 8167652
Fax: 03-9167650

28 May 1994

Dharmaraja @ Abdul Malik
a/l Abdul Wahab
C5-10 Tingkat 5, Jalan Asa 9
Taman Asa Jaya
43000 Kajang
Selangor Darul Ehsan

A Dear Sir,

In the last four weeks or so, I have had at least six meetings with you together Mr Abul and Mr Bala to discuss about the operation of Shuttle Kilns, which of late seemed to be inconsistent as far as temperature control was concerned, thereby adversely affecting the quality of the fired ovenware.

B In the last one week, ie for the period 19 May to 25 May 1994, at least four cars of ovenwares from the Shuttle Kilns were substantially damaged due to poor firing control and too high temperature.

On the morning of 27 May 1994, I called for a meeting in which you, Abul, Bala and 4 kiln operators were present. I had explained to all concerned that from the buller rings which we put into the furnace, the temperatures in C the furnace had sometimes reached 1300 degrees centigrade. The maximum firing temperature should be only 1200 degrees centigrade. No wonder we were getting distortions of ovenwares like before. I had also, pointed out that the company had suffered a loss of about $4000 in the last one week. It has also been ascertain that the second shift workers had been sleeping regularly. For example, on 23 May, three out of four workers were sleeping from 0230 hours to 0500 hours.

D *After the meeting which ended at about 10.30am, I was informed that you had left the factory together with all the five kiln operators without informing anybody.* You had also threatened the guard on duty. By your action, you had deliberately trying to sabotage the operation of the factory.

Under the above circumstances, *it is deemed that you had dismissed yourself* E *from the service with the company according to the labour laws.* With immediate effect you are being declared as 'persona non grata' to this factory. This means that you not permitted to enter the factor at all. Also, according to the labour laws, you should pay back one month salary to the company since you just walked out from your job without giving any notice. Therefore your salary for the month of May 1994 will be retained by the company.

F Yours sincerely,

Sgd (Emphasis added.)

In the context of this letter, it is relevant to point out that in reply to the statement of claim of the claimant that his dismissal was without just cause or excuse and effected in violation of the principles of natural justice and G that it was tainted with mala fides, the company denied dismissing the claimant and stated that the claimant by walking out without the approval of the company or without good reason had by 'his own conduct' terminated his employment. Further it was stated that he had absented himself and 'had by his own conduct terminated his employment without notice.'

H The company relied on s 15(2) of the Employment Act to argue that the claimant had breached his contract of employment.

Section 15(2) reads as follows:

An employee shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two consecutive working days without prior leave from his employer, unless he has I a reasonable excuse for such absence and has informed or attempted to inform his employer of such excuse prior to or at the earliest opportunity during such absence.

This is what the chairman of the industrial court said in respect of s 15(2) in the context of his finding of facts:

> The word consecutive has been defined in *Oxford Dictionary of Current English — New Edition* (2nd Ed) as following continuously in unbroken or logical order. In the instant case the claimant's absence can be said to be continuous. The claimant was absent for more than two days. He was absent for more than two days without prior leave of the company and without reasonable excuse and without informing or attempting to inform his employer. On the ground I find the claimant had breached his contract of employment with the company. No reasonable employer is excepted to wait indefinitely for the employee to return to work. The statute has made the position clear to both parties. I therefore hold the dismissal of the claimant was with just cause or excuse.

I agree with the submission of learned counsel for the claimant that the chairman erred in applying s 15(2). As was pointed out firstly, in order for s 15(2) to apply, the employee must be absent from work for two continuous working days. In the present case the letter by which the claimant was deemed as having dismissed himself was dated 28 May 1994. At that date two continuous days had not passed. It must be noted that the chairman observed that the claimant had admitted that he returned on 30th but was refused entry into the factory and he took into account the 29th and 30th as consecutive days.

But these dates were after the date of the 'dismissal' letter. At the time of the letter, there were no two consecutive days of absence.

The second point made, with which I also agree, is that it is clear that the chairman wrongly took into account the 29th as being a working day when the 29th was a Sunday, the claimant's day off. There was evidence to that effect.

What has to be noted is that the company failed to prove continuous absence of two working days. The chairman clearly misapplied s 15(2) of the Employment Act. He failed to take into account a very relevant fact, ie that at the time of purported dismissal there had been no absence of two continuous working days.

There was another argument made by the counsel for the claimant, the third point, that even if there was absence of two continuous working days, s 15(2) does not entitle the company to deem the employee as having terminated the contract of service. Here it must be remembered that in their pleadings the company denied dismissing the claimant. Instead the company claimed that the claimant had himself terminated the employment. Counsel has relied on the case of *Gim Aik Estate Sdn Bhd Malacca v National Union of Plantation Workers* [Jan – June 1982] MLLR 117 (Award No 5582), where his Lordship Harun Hashim J (as he then was) then sitting as the president of the Industrial Court gave his decision which commends itself for the clarity in principles. His lordship dealt with s 15 of the Employment Ordinance 1955 applicable at the material time:

> Section 15 of the Employment Ordinance 1955 reads:
>
> (1) An employer shall be deemed to have broken his contract of service with the employee if he fails to pay wages in accordance with Part 111.

A (2) An employee shall be deemed to have broken his contract of service with the employer if he has been continuously absent from work for more than two days —

(a) without prior leave form his employer or without reasonable excuse; or

(b) without informing or attempting to inform his employer of the B excuse prior to or at the earliest opportunity during such absence.

It is said that the court held that where an employee has been continuously absent from work more than two days in the circumstances described in s 15(2) of the Employment Ordinance ('the Ordinance'), the employer may automatically terminate the employment. We find that the court made no specific reference to s 15(2) of the Ordinance. We also find that there is no C such thing as statutory termination. Breach of contract of services and termination of employment are two different things. A breach of contract of service may or may not lead to termination of employment. Section 15 of the Ordinance is only a deeming provision. It cannot be the intention of the legislature that employees automatically lose their jobs whenever an employer fails to pay their wages. Nor do we foresee employees terminating their D contracts of service every time an employer delays paying their wages for more than seven days after the due date. In such instances, the employer commits an offence and may be dealt with under s 91 of the Ordinance.

Unlike the employer, there is no penalty clause in the Ordinance against the employee if he breaches his contract of service. The consequence of any such breach is dependent on the conditions of employment and the provisions E of the ordinance. Absence without prior leave for more than two days (as in the instant case) is deemed to be a breach of the contract of service by s 15(2) of the Ordinance. If the circumstances of the breach are such that it justifies termination of service, then the employer may terminate the contract of service under s 13(2) of the Ordinance, which provides:

F 'Either party to a contract of service may terminate such contract of service without notice in the event of any wilful breach by the other party of a condition of the contract of service.'

In our case, the company had denied dismissing the claimant and have stated the claimant had by his own conduct terminated his employment.

If there is an absence of two consecutive days that does not mean that G the contract of employment comes to an end automatically nor does it entitle the company to dismiss an employee as of right. The circumstances surrounding the absence must first be considered. In the instant case, there has not even been a breach of contract under s 15(2) as there has been no absence for more than two consecutive working days.

H I think what I have stated so far on the first ground in this application ie, the chairman had misconstrued and misapplied s 15(2) of the Employment Act in arriving at his decision that the claimant had breached his contract of employment with the company, is sufficient for an order of certiorari to issue.

In passing, I wish to state I find merit with three other grounds, namely: I

(1) the two ground, that the court had arrived at its decision that was baseless and unreasonable when it decided that the claimant did not attend work for more than two working days;

(2) the third ground, that the court arrived at a decision that was baseless and unreasonable when it held that the claimant did not attend work on 29 May 1994 when the day was a Sunday and a rest day for the claimant;

(3) the fourth ground, that the court failed to take into account that the claimant was contacted by the company's director, Mr Lim, who directed the claimant to return to work at 3pm on 30 May 1994 and that the claimant followed the instruction.

In the circumstances certiorari is to issue to quash Industrial Court Award No 604 of 1997 dated 24 December 1997 and the matter is remitted to the Industrial Court to be heard by another chairman. Costs to the claimant.

Order of certiorari granted.

Reported by Benjamin Yong